IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 20, 2007

STATE OF TENNESSEE v. TAZWONE DEMARCUS MATTRESS

Direct Appeal from the Criminal Court for Knox County
No. 80252 Richard R. Baumgartner, Judge

No. E2006-00862-CCA-R3-CD - Filed August 16, 2007

Following a jury trial, Defendant, Tazwone Demarcus Mattress, was found guilty of second degree murder. The trial court sentenced Defendant as a Range I, standard offender, to twenty-five years imprisonment, and ordered Defendant's sentence for his felony conviction to be served consecutively to two outstanding misdemeanor sentences. On appeal, Defendant argues that (1) the evidence was insufficient to support his conviction; (2) the trial court erred in permitting the State to introduce evidence of Defendant's prior juvenile adjudications; and (3) the trial court erred in imposing consecutive sentences. Defendant does not challenge the length of his sentence for his murder conviction. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

Bruce E. Poston, Knoxville, Tennessee, for the appellant, Tazwone Demarcus Mattress.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Randall E. Nichols, District Attorney General; Ta Kisha M. Fitzgerald, Assistant District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Defendant's conviction arose out of an altercation between Defendant, Tyshawn Howell, Michael Cowan, and Demond Woodard, the victim, which occurred in the parking lot of Max's Lounge in Knoxville on June 30, 2004.

Mr. Howell testified that he won a maroon Chevrolet in a crap game. Mr. Howell, Defendant, and a man called "Fat Anthony," were driving around in the maroon car on June 30, 2004, when they spotted the victim sitting on a parked scooter. Mr. Howell stopped and asked the victim if he could drive the scooter. The victim agreed, if he (the victim) could drive Mr. Howell's car. The two men made plans to meet in parking lot "P" of the Walter P. Taylor Homes in a few minutes. Defendant and "Fat Anthony" stayed in Mr. Howell's car.

Mr. Howell drove to the designated parking lot on the scooter, but the victim did not show up. According to Mr. Howell, he spotted Defendant about fifteen or twenty minutes later, and together they flagged down Mr. Cowan who was driving a black Honda Civic. Mr. Howell asked Mr. Cowan to drive him around to see if he could find the victim. Mr. Howell acknowledged that he was mad at the victim for not returning his car as planned. Mr. Howell said that he saw the victim driving the maroon Chevrolet on Magnolia Avenue going in the opposite direction. Mr. Howell attempted to flag down the victim, but the victim did not stop. Mr. Howell stated that Defendant was driving the Honda Civic at this point.

The three men eventually located the victim in the parking lot of Max's Lounge where the victim was talking to Rodney Miller. Mr. Howell, Defendant, and Mr. Cowan got out of the Honda Civic and confronted the victim over Mr. Howell's car. Mr. Howell said that the victim shoved him in the chest. Mr. Miller grabbed the victim, and Defendant and Mr. Cowan grabbed Mr. Howell. Mr. Howell said that he got into the maroon Chevrolet. A woman and child were sitting in the front passenger seat, and Mr. Howell told them to get out of the car. As he was getting into his car, Mr. Howell noticed that Defendant had a silver gun in his hand. Mr. Howell told Defendant that he was going to get his gun, and he drove out of the parking lot. Mr. Howell said that he heard about six gunshots, put his car into reverse, and backed into the parking lot. The victim was laying face down in the gravel, and Defendant and Mr. Cowan were getting into the black Honda Civic.

On cross-examination, Mr. Howell acknowledged that he initially told the investigating officers that he did not see a gun in Defendant's hand. Mr. Howell said that he had previously been shot in both arms, leaving him with the limited ability to use either arm. Mr. Howell said that the victim was aware of his injuries and knew that Mr. Howell would not be able to defend himself if a fight broke out. Mr. Howell said that Defendant was not mad at the victim and did not voice any threats against the victim while the men drove around in Mr. Cowan's car. Mr. Howell described the victim as mad and embarrassed because Mr. Howell had confronted him in public about the automobile. Mr. Howell said that the victim smelled of alcohol and acted like he was drunk.

Mr. Howell said that he told Defendant about an incident involving the victim which had occurred at another bar. Mr. Howell said that the victim was mad and drunk on this occasion because his cousin had just been killed. The victim and another man beat up one of the bar's patrons and shot the patron in the head. Mr. Howell said that the patron did not do anything to the victim other than the fact that he "turned around and looked at the wrong person on the wrong day."

On redirect, Mr. Howell said that this incident occurred in 2002. Mr. Howell admitted that he had been afraid of the victim all of his life and tried to stay "cool" with him.

Mr. Cowan stated that Defendant, Mr. Howell, and the victim were cousins. Mr. Cowan testified that he, Defendant and Mr. Howell drove around Knoxville looking for the victim on June 30, 2004. Mr. Cowan said that he was driving his black Honda Civic. Mr. Howell got in the car first and then Mr. Cowan picked up Defendant. Mr. Howell got into the back seat, and Defendant got into the front seat. Mr. Cowan said that they spotted the maroon Chevrolet on Magnolia Avenue and subsequently located the victim at Max's Lounge. A woman and child were in the passenger seat of the Chevrolet, and the victim was standing next to the car talking to Mr. Miller and another woman.

The three men exited the black Honda Civic. Mr. Howell told the victim, "It's messed up. You had my car, and you was [sic] supposed to have brought it right back." The victim responded, "Y'all got me f___ [sic] up. Y'all trying to play with me." Mr. Cowan said that the victim pushed Mr. Howell into the car. Mr. Cowan and Defendant rushed over to break up the fight. Mr. Cowan testified that he did not see anything in Defendant's hands at this point. Mr. Cowan grabbed the victim by one arm, and Mr. Miller grabbed his other arm. Mr. Cowan said that Defendant then waved a gun in the air and told the victim that he could not fight his cousin. Mr. Cowan told Defendant and Mr. Howell that they needed to leave, and Mr. Cowan started walking back to his car. Mr. Cowan said he thought the confrontation was over at this point. The victim then yelled, "Y'all acting like some little bitches over this car." Mr. Cowan heard gunshots, ran around his car, and saw the victim laying on the ground. Defendant was standing about three or four feet from the victim with a gun in his hand.

Mr. Cowan and Defendant jumped into the Honda Civic. A woman ran up to the front passenger side where Defendant sat and banged on the window. Defendant, who still had the gun in his hand, said, "Move, bitch." Mr. Cowan drove out of the parking lot and dropped Defendant off at a stop sign.

Mr. Cowan said that the victim fell to his knees first, and then to the ground. Mr. Cowan gave a statement to the police the following day and identified Defendant as the shooter from a photographic lineup.

On cross-examination, Mr. Cowan said that Defendant never threatened to harm the victim while they drove around town that afternoon. Mr. Cowan said that the victim was mad and smelled of alcohol. Mr. Cowan interpreted the victim's phrase, "you're trying to play with me," as a threat directed toward both Mr. Howell and Defendant. Mr. Cowan said that when he heard the gunshots, he initially thought the victim had shot Defendant. Mr. Cowan said that the victim was "a known shooter."

Rodney Miller, Anisha Dearmond, and Ladreama Stacy were parked next to Mr. Howell's maroon Chevrolet at Max's Lounge. The victim got out of the Chevrolet to talk to Mr. Miller. A

woman and baby were sitting in the Chevrolet's front passenger seat. Ms. Stacy said that a black Honda Civic drove into the parking lot in a few minutes. Mr. Howell was in the backseat, and Defendant was in the front passenger seat. Mr. Howell got out of the car first, followed by Defendant. Ms. Stacy said that Defendant had a gun in his hand. Mr. Howell and the victim argued over the maroon Chevrolet, and the victim pushed Mr. Howell. Mr. Miller tried to break the fight up. Ms. Stacy testified that Mr. Howell tried to get the gun away from Defendant, but Defendant would not let him have the gun. Mr. Howell got into the maroon Chevrolet, still arguing with the victim. Mr. Howell started to pull out of the parking lot, and the victim hit the back of the automobile with his hand. Defendant returned to the Honda Civic. Defendant and the victim exchanged words, and Defendant started shooting.

Ms. Stacy said that Mr. Miller got back into the car, and the group left the parking lot. The two women dropped Mr. Miller off because he had an outstanding warrant for his arrest and then returned to the crime scene. Ms. Stacy said that the victim was laying on the ground. Ms. Stacy acknowledged that she did not speak with any of the investigating officers while she was there. Ms. Stacy said that she did not see anyone else in the parking lot with a gun, and she did not hear the victim threaten Defendant.

On cross-examination, Ms. Stacy said that she heard Defendant tell the victim to stop, but the victim kept coming toward Defendant.

Ms. Dearmond described the victim as angry, aggressive, and drunk. Ms. Dearmond heard Mr. Howell ask Defendant for his gun. Mr. Howell got into the maroon Chevrolet after Defendant refused to let him have the gun. Ms. Dearmond said that after Mr. Howell drove off, the victim and Defendant continued to argue. She stated that Mr. Miller prevented the two men from fighting twice, and that when Defendant and the victim lunged at each other the third time, Defendant pulled out a gun and shot the victim. Ms. Dearmond said that Defendant stood over the victim after he fell to the ground and shot straight down two or three times. Ms. Dearmond said the victim's female companion ran up to the Honda Civic's front passenger window, and Defendant pressed his gun against the glass. Ms. Dearmond said that Defendant appeared calm during the altercation.

Kyera Davis testified that the victim was her "god brother," and they often spent time together. Ms. Davis said that the victim picked her and her daughter up on June 30, 2004, in a maroon Chevrolet, and they rode around town looking for Mr. Howell. The victim drove past Max's Lounge and stopped to talk to friends. Ms. Davis remained in the Chevrolet with her daughter. Ms. Davis acknowledged that the victim had been drinking that afternoon, but she stated that the victim only had "two or three sips from a bottle."

Ms. Davis said that a black Honda Civic pulled into the parking lot about ten minutes after she and the victim arrived. Mr. Howell got out of the car and started yelling at the victim. Mr. Cowan and Defendant got out of the car also and stood by Mr. Howell. Mr. Howell pushed the victim with both hands, and the victim warned Mr. Howell not to do that. Mr. Howell got into the Chevrolet and told Ms. Davis to get out of the car, which she did. Ms. Davis said that the crowd

began to disperse, and Mr. Howell drove away. The victim backed away from Defendant and Mr. Cowan who were walking toward the Honda Civic. Ms. Davis said that Defendant stopped and then started shooting. Ms. Davis said that the victim never said anything to Defendant. Ms. Davis said that someone in the crowd grabbed her baby, and Ms. Davis ran up to the Honda Civic. She banged on the front passenger window, and Defendant pointed a gun at her, so she backed away. Ms. Davis said that Defendant did not look scared.

Officer Woody Bingham with the Knoxville Police Department responded to the 911 call about a shooting at Max's Lounge and arrived in ten or fifteen seconds. The victim was laying face down in the parking lot, and between seventy and seventy-five people were milling around the area. Officer Bingham verified that the victim was dead. Officer Bingham said that no one came forward at the crime scene as an eyewitness to the shooting.

Officer Janice Gangwer, with the Knoxville Police Department's forensic unit, testified that four Winchester .45 caliber automatic bullet casings, and three Federal .45 caliber automatic bullet casings were found at the scene. A metal bullet jacket and bullet fragment were retrieved from the victim's clothing. The bullet casings were found within twenty feet of each other in the same general area as where the victim was found.

Officer Joseph Huckleby with the Knoxville Police Department was the lead investigator of the case. Officer Huckleby said that one of the investigating officers received information identifying Defendant as the shooter. Officer Huckleby transported Ms. Davis and her child to the police department for an interview. Ms. Davis identified Defendant from a photographic lineup. Officer Huckleby testified that his investigation did not reveal that the victim was armed during the altercation.

The police were unable to locate Defendant until Defendant turned himself in on July 13, 2004. Defendant was interviewed by Officer Huckleby. Defendant at first denied that he had shot the victim. Then, Defendant said that somebody in the crowd at Max's Lounge fired first, and he discharged his weapon in response.

Officer Huckleby asked Defendant again what happened that afternoon. Officer Huckleby read this portion of Defendant's statement into the record:

> [Mr. Howell] got in the car. So when [Mr. Howelll] was pulling off, [the victim] kept beating on [Mr. Howell's] trunk, trying to get [Mr. Howell] to stop. [Mr. Howell] didn't stop. So [the victim] walked toward the car. As I was walking to the car, he swung or acted like he was ready to swing, and I shot, and the first bullet hit him. He turned. I shot again. After them [sic] first – after them [sic] first two shots, to tell you the truth, I really don't remember.

Defendant said that he told the victim that if he hit Mr. Howell, the three men were ready to fight with the victim. Defendant said he was armed with a .45 caliber automatic pistol, and that he

later threw the gun into some bushes on Harrison Street. Officer Huckleby said that the gun was never located. Defendant told Officer Huckleby that he was "chilling" in Pigeon Forge after the shooting.

Officer Huckleby said that Defendant's version of the shooting was not consistent with the information from the witnesses' interviews. Defendant told Officer Huckleby that he had never had a conflict with the victim before the shooting. Officer Huckleby stated that Defendant never said that he was afraid of the victim.

Patricia Resig, a firearms identification expert with the Knoxville Police Department, examined seven fired cartridge cases and six bullet jackets which were retrieved from the crime scene. Officer Resig testified that the seven cartridge cases were fired from the same unknown gun. Two of the bullet jackets were fired from the same gun. The other four bullet jackets shared some of the same class characteristics but not enough to make a conclusive identification that these four jackets were fired from the same gun as the other two jackets.

Dr. Drinka Mileusnic Polchan, the assistant chief medical examiner for Knox County, performed an autopsy on the victim on July 1, 2004. Dr. Polchan testified that the victim sustained four gunshot wounds. Two gunshots entered the front of the victim's body, and two entered from the back. The frontal entry wounds included a gunshot to the front of the victim's left thigh. The other gunshot entered the victim's right abdominal region, exited above the right groin area, reentered the body, and lodged in the victim's right buttock. The bullet followed a steep downward trajectory and was consistent with the victim being in a bent position when this shot was fired. Dr. Polchan stated that neither frontal wound showed any stippling, gunpowder residue or soot around or inside the wounds indicating that the shooter was standing more than three feet from the victim when he discharged these gunshots.

A third gunshot wound entered the victim's lower back and exited from the right abdominal area with a downward trajectory. Gunpowder residue inside the wound indicated that this shot was fired at close range. The fourth gunshot entered the right back of the victim's head about three inches from the top of his head. The bullet was fired at close range and transected the right side of the victim's brain, almost completely severing the brain stem.

Dr. Polchan testified that based on the position of the victim at the crime scene, it was her belief that the gunshots to the thigh and abdomen were fired first, followed by the gunshots to the victim's back and head. An abrasion on the victim's chin was consistent with the victim coming to rest face down in the gravel. Dr. Polchan said that the abrasion was minor indicating that the victim fell to the ground "relatively slowly." Dr. Polchan acknowledged that her findings were consistent with the victim being shot in the thigh first, spinning around, shot in the abdomen, falling to his knees, shot in the back, falling face down on the gravel, and shot in the head. Dr. Polchan said that the victim's blood alcohol level was 0.169.

The State rested its case-in-chief, and Defendant testified on his own behalf. Defendant said that he, Mr. Howell and "Fat Anthony" were riding around in Mr. Howell's Chevrolet when they saw the victim sitting on a scooter. Mr. Howell pulled into the parking lot. The victim agreed to trade the scooter for the Chevrolet and said he would meet Mr. Howell in the parking lot a couple of blocks down the street. The victim drove to a liquor store instead, and Defendant and "Fat Anthony" got out of the car. Defendant told the victim he was supposed to meet Mr. Howell in the parking lot, and the victim responded, "I got that."

Defendant met Mr. Cowan and the two men started riding around in Mr. Cowan's car. Defendant said Mr. Howell flagged them down on Bethel Avenue and asked the two men to help him find his car. He acknowledged that he was armed with a .45 caliber automatic pistol. Defendant said that he bought the gun for protection shortly after Mr. Howell was shot, but he said that he had never fired the weapon before the incident. Defendant said that he wore the gun at his waist under his shirt.

Defendant said the three men drove around for a couple of hours. They first saw the Chevrolet on Magnolia Avenue and then later parked at Max's Lounge where the victim was talking to some people. Defendant said that all three of them got out of Mr. Cowan's car, and Mr. Howell confronted the victim. Defendant described the victim as "mad and aggressive." Defendant said the victim was drunk. The victim shoved Mr. Howell into the Chevrolet, and he, Mr. Cowan, and Mr. Miller pulled the two men apart. Defendant told Mr. Howell to get in his car. The victim struck the car's trunk with his hands as Mr. Howell pulled out. Defendant said he was walking back to Mr. Cowan's car when the victim started yelling at him. Defendant believed the victim was threatening him. Defendant said he was scared because he knew that the victim always carried a gun. The victim came toward him. Defendant pulled out his gun and told the victim to stop. When the victim did not stop, Defendant shot him. Defendant said that he remembered firing two gunshots, but did not remember anything after that. Defendant said the next thing he remembered, he was in Mr. Cowan's car and Mr. Cowan was telling him to get out. Defendant said he ran and threw the gun away.

Defendant said that he thought his life was in danger during the confrontation because he knew that the victim had killed other people. Defendant said that in addition to the shooting at Gene's Place which Mr. Howell had described during his cross-examination, the victim had killed a man during a drug transaction on Magnolia Avenue but was never charged with the offense. Defendant said that he saw the victim pistol whip a man who had said something derogatory about one of the victim's friends. Defendant said that the victim spent time in prison for shooting a man eleven times and described other examples of the victim's violent behavior.

On cross-examination, Defendant said that the first time he armed himself was after Mr. Howell was shot in March 2004. Defendant said he did not remember being charged with possession of an assault rifle when he was twelve-years-old. Defendant acknowledged that he shot his stepfather with a .32 caliber pistol in 2000, but he said that the gun was not his. Defendant said he went and got a gun on that occasion because his stepfather was beating Defendant's mother.

Defendant said he thought the murder weapon was loaded with regular bullets, not hollow point bullets. Defendant said that the worst scenario he believed would occur that afternoon was that he, Mr. Cowan and Mr. Howell would "gang" the victim. Defendant denied that Mr. Howell asked him for his gun during the confrontation. Defendant said that his stepfather drove him to Pigeon Forge and paid for his motel room and some groceries. Defendant said he returned to Knoxville after four or five days.

Officer Huckleby was called as a rebuttal witness. He testified that he saw Defendant sitting on a sidewalk with a sawed-off shotgun or rifle behind him and arrested him for illegal possession of a weapon. Officer Huckleby could not remember how old Defendant was at the time but knew he was a juvenile.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of second degree murder because the State failed to negate his theory of self-defense beyond a reasonable doubt. At trial, Defendant did not deny that he shot and killed the victim but argued that his conduct was justified because he acted in self-defense.

At the time of the offense, Tennessee Code Annotated section 39-11-611(a) provided that:

> [a] person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

The State bears the burden of proving that the defendant did not act in self-defense when a defendant relies upon a theory of self-defense. *State v. Sims,* 45 S.W.3d 1, 10 (Tenn. 2001). Whether an individual acted in self-defense is a factual determination to be made by the jury as the sole trier of fact. *State v. Ivy,* 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). Upon this Court's review of a jury's rejection of a claim of self-defense, "in order to prevail, the [appellant] must show that the evidence relative to justification, such as self-defense, raises, as a matter of law, a reasonable doubt as to his conduct being criminal." *State v. Clifton,* 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994).

Defendant argues that the evidence was uncontroverted that the victim was angry and drunk at the time of the confrontation, and that the victim acted aggressively toward Mr. Howell. Defendant submits that there was no evidence contradicting his testimony that he feared for his life when the victim began to advance on him, and that this fear was reasonable based on the victim's reputation for violent behavior.

The only evidence that Defendant was afraid of the victim came from his own testimony. Mr. Cowan and Mr. Howell both testified that Defendant was not mad at the victim over the car incident. Although there was a general consensus among the witnesses that the victim was angry and aggressive when Mr. Howell confronted him, there was no evidence that the victim was armed. Moreover, any threat the victim may have posed toward Defendant was dissipated after Defendant shot the victim in the leg and abdomen. Defendant, however, then walked up to the victim and shot him in the lower back and finally in the back of his head. Any inconsistencies in the testimony concerning the sequence of events which occurred immediately prior to the shooting were obviously resolved in favor of the State. Based on our review, we conclude that the jury was well within its prerogative in rejecting Defendant's claim of self-defense.

Alternatively, Defendant contends that at most he is guilty of the offense of voluntary manslaughter rather than second degree murder.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black,* 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland,* 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews,* 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The offense of second degree murder is defined as the knowing killing of another. T.C.A. § 39-13-210. A person acts "knowingly" with respect to the result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. *Id*. § 39-11-302(b). The offense of voluntary manslaughter is defined as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." *Id*. § 39-13-211(a). "Whether the acts constitute a 'knowing killing' (second degree murder) or a killing due to 'adequate provocation' (voluntary manslaughter) is a question for the jury." *State v. Johnson,* 909 S.W.2d 461, 464 (Tenn. Crim. App. 1995).

The evidence supports the jury's finding that Defendant knowingly shot and killed an unarmed man. The jury was given the option of voluntary manslaughter as a lesser included offense and chose to reject both the notion of provocation and the claim of self-defense which was well within its prerogative. Based on our review, we conclude that the evidence is sufficient beyond a

reasonable doubt to support Defendant's conviction of second degree murder. Accordingly, Defendant is not entitled to relief on this issue.

III. Evidence of Prior Bad Acts

Defendant argues that the trial court erred in allowing the State to cross-examine Defendant about his prior juvenile adjudications. Defendant contends that he did not "open the door" to the State's line of questioning, and that the questions were highly prejudicial. Defendant also argues for the first time on appeal that the admission of evidence concerning his prior juvenile adjudications was elicited in violation of Rules 404(b), 405 and 609 of the Tennessee Rules of Evidence.

Defendant testified on direct examination that he purchased the .45 automatic pistol which was used in the shooting, a few weeks after Mr. Howell was shot in March 2004. Defendant said that he purchased the gun for protection "[be]cause everybody was getting shot, it seemed, that was around [him]." During cross-examination, the prosecutor asked, "And are you telling this jury that the first time you armed yourself with a gun was after March of 2004?" Defendant responded, "Yes, ma'am," and the prosecutor requested a bench conference.

Other than requesting that the State "make it clear" that Defendant purchased the murder weapon in March 2004, defense counsel did not object to the prosecutor's line of questioning. The prosecutor told the trial court that Detective Huxley would testify that he removed a gun from Defendant's possession when Defendant was twelve years old. The prosecutor also stated that he had evidence that Defendant had shot his mother's boyfriend when he was sixteen. The trial court found that the prosecutor could question Defendant about the two prior juvenile adjudications.

Defendant then testified that he could not recall the incident concerning the possession of a weapon when he was twelve years old. Defendant acknowledged that he shot his mother's boyfriend with a .32 caliber pistol in 2000. Defendant stated, however, that he was not armed when the altercation began, but he retrieved the gun after the victim began striking Defendant's mother.

The State called Detective Huckleby as a rebuttal witness. Detective Huckleby testified that he had apprehended Defendant when he noticed that Defendant, who was sitting on the sidewalk, had either a sawed-off shotgun or a rifle behind him. Detective Huckleby could not remember how old Defendant was at the time of this incident, but he recollected that Defendant was a juvenile. Defendant did not object to Detective Huckleby testifying as a rebuttal witness.

The record reflects that Defendant did not contend that the evidence was inadmissible pursuant to the Rules of Evidence during the hearing conducted outside of the presence of the jury. A party is bound by the ground asserted when making an objection. *State v. Adkisson,* 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994). That is, "a defendant may not object to the introduction of evidence on one ground, abandon this ground, and assert a new basis or ground for the objection in this Court." *State v. Korsakov*, 34 S.W.3d 534, 545-46 (Tenn. Crim. App. 2000); *State v. Aucoin,*

756 S.W.2d 705, 715 (Tenn. Crim. App. 1988). Thus, Defendant has waived his argument to the extent such argument is predicated on violations of Rule 404(b), Rule 405, and Rule 609.

IV. Consecutive Sentencing

Following a sentencing hearing, the trial court sentenced Defendant to twenty-five years for his second degree murder conviction. The trial court ordered Defendant to serve his sentence for second degree murder consecutive to his prior misdemeanor sentences for which he was on probation at the time of the current offense upon finding that Defendant was a dangerous offender as set forth in Tennessee Code Annotated section 40-35-115(b)(4). Defendant argues that the trial court erred in imposing consecutive sentences. Specifically, Defendant submits that the trial court failed to make the requisite findings set forth in *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995) and thus may not rely upon Defendant's status as a dangerous offender in determining whether or not Defendant should serve his sentences consecutively.

We note that the legislature effective June 7, 2005 has recently amended several provisions of the Criminal Sentencing Reform Act of 1989. However, although Defendant was sentenced after the effective date of the Act, Defendant's crime in this case occurred prior to June 7, 2005, and Defendant did not elect to be sentenced under the provisions of the Act by executing a waiver of his ex post facto protections. *See* 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld,* 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus,* 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo. State v. Shelton,* 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams,* 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn. 1991).

When a Defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories listed in Tennessee Code Annotated section 40-35-115. In this instance,

the trial court found that Defendant was "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." T.C.A. § 40-35-115(a)(4). If the trial court rests its determination of consecutive sentencing on this category, the court must make two additional findings. *Imfeld,* 70 S.W.3d at 708. First, the trial court must find that an extended sentence is necessary to protect the public from further criminal conduct by Defendant, and, second, it must find consecutive sentencing to be reasonably related to the severity of the offenses. *Wilkerson,* 905 S.W.2d at 939. Although such specific factual findings are unnecessary for the other categories enumerated in Tennessee Code Annotated section 40-35-115(b), the imposition of consecutive sentences is also guided by the general sentencing principles that the length of a sentence be 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.'" *Imfeld,* 70 S.W.3d at 708 (quoting T.C.A. §§ 40-35-102(1) and -103(2)); *State v. Lane,* 3 S.W.3d 456, 461 (Tenn. 1999). It is within the sound discretion of the trial court whether or not to impose consecutive or concurrent sentences. *See State v. Adams,* 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

At the sentencing hearing, Officer Wallace Armstrong with the Knoxville Police Department testified that he investigated a charge of attempted murder against Defendant arising out of an incident occurring on November 9, 2000 when Defendant was sixteen years old. Officer Armstrong said that Defendant was read his *Miranda* rights, and Defendant and his mother executed a written waiver of those rights. In his statement, Defendant said that his mother came to him for help because she and Defendant's step-father had gotten into an argument. When Defendant arrived at his mother's house, his step-father started reaching for his gun, and Defendant left. Defendant said that his step-father followed him into the road, grabbed Defendant on his shoulders, and Defendant shot him. Defendant said that he discharged his weapon because he did not know whether the victim was armed.

Donna Mullins, a residential care manager at the Bradley County Group Home, testified that Defendant was transferred to the Home on October 7, 2002, from the Mountain View Youth Development Center. Ms. Mullins stated that Defendant committed several infractions over the next few months which included the use of obscene language, failure to follow the Home's rules, and the commission of assaults on other students. Defendant obtained a job but was fired when he failed to show up for work. Ms. Mullins said that Defendant was terminated from the program on December 16, 2002, after assaulting another student, and he was returned to the supervision of the Mountain View Youth Development Center.

Officer Harry McGuffee, with the Knoxville Police Department, was on patrol in 2003 when he observed Defendant approach a parked vehicle and transact some sort of exchange. Officer McGuffee told Defendant to stop, and Defendant ran away. Officer McGuffee said that Defendant was subsequently arrested for evading arrest.

Detective Huckleby testified that he interviewed Defendant in connection with the aggravated robbery of a woman and her son outside a store in October 2003. Defendant gave a written statement in which he stated that he used a knife during the robbery and received approximately forty-nine

dollars. On cross-examination, Detective Huckleby acknowledged that Defendant pled guilty to misdemeanor theft in connection with the charge.

Beth Adkins with the Tennessee Board of Probation and Parole, testified that Defendant was placed on judicial diversion for the 2003 evading arrest conviction. Defendant received a sentence of eleven months, twenty nine days, for the 2003 theft charge, all of which was suspended and Defendant placed on probation. Defendant reported to Ms. Adkins' office on February 9, 2004. Ms. Adkins explained the conditions of Defendant's probation for the theft charge which included performance of community service, restitution and payment of court costs and fees. Ms. Adkins said that Defendant stopped reporting after April 5, 2004. Defendant made partial payments in restitution and toward his court costs and fees. Ms. Adkins said that Defendant did not show proof that he had performed his community service. A warrant of violation of probation was filed on June 11, 2004, which was amended after Defendant incurred the murder charge. Defendant's probation and judicial diversion were subsequently revoked.

The State entered the presentence report into the record as an exhibit. According to the presentence report, Defendant was twenty-one years old at the time of the sentencing hearing. Defendant reported that he received a high school diploma from the Taft Youth Development Center. Defendant stated in the report that he was sent to the Center after he was convicted of the aggravated assault of his step-father. Defendant did not report any work history other than two jobs which each lasted a month. Defendant acknowledged that from the time he was fourteen years old until his incarceration, he smoked one ounce of marijuana each day. The presentence report shows that in addition to the charges discussed during the hearing, Defendant received juvenile adjudications for disorderly conduct and assault in 1999, and evading arrest in 2000.

At the sentencing hearing, Defendant observed that for every action, there is a reaction, and he stated that he was sorry that his reaction "went this far." Defendant said he was sorry for the victim's family's loss, "but it was something [he] couldn't control."

The trial court stated:

> [Defendant], you have engaged in a lot of conduct in a very short period of time, a very young age, that is violent. Your juvenile history indicates that violence, where you shot an individual because you were concerned he might have a gun, as you told [the police officer], and I read the statement. You know, you said you weren't afraid of [your step-father]. You just shot him because you weren't sure what he was going to do, and you were going to shoot him first, which is remarkably similar to the position that you took in this present case, and it's troubling.

The trial court also found that Defendant had been given numerous opportunities to be released into the community but failed to comply with the conditions of his release, and the record reflects that Defendant was on probation when the charged offense occurred. The trial court found that Defendant was a dangerous offender who had indicated on more that one occasion that he had

little or no regard for human life, and no hesitation about committing a crime in which the risk to human life was high. The trial court summarized, "You've indicated that on more than one occasion. You're very, very young, but you've earned that distinction of being a dangerous individual. It gives me no pleasure to find that."

While the trial court did not expressly recite the *Wilkerson* factors, the trial court's decision to impose consecutive sentences is supported by the record. The record reflects that Defendant shot the unarmed victim four times, and the final shot was a close range shot to the back of the victim's head after he had been disabled by the previous three shots. In our view, the violent conduct in which Defendant engaged in this instance and on prior occasions supports the trial court's finding that Defendant qualified as a dangerous offender and was not amenable to rehabilitation. It is clear that consecutive sentences are necessary to protect the public and reasonably relate to the severity of this violent offense.

Moreover, the record supports a finding that Defendant was on probation for his theft conviction at the time he committed the current offense. T.C.A. § 40-35-115(b)(6); *see State v. Vidal L. Strickland*, No. M2002-01714-CCA-R30-CD, 2003 WL 22243440, *15 (Tenn. Crim. App., at Nashville, Sept. 30, 2003), *perm. to appeal denied* (Tenn. Oct. 17, 2005) (commission of current offense while on probation for a misdemeanor offense sufficient to support trial court's order of consecutive sentences). It is necessary to find the presence of only one of the statutory categories listed in Tennessee Code Annotated section 40-35-115(b) to support the imposition of consecutive sentences. *State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997).

After our review of the record, we conclude that the trial court did not err in ordering Defendant to serve his murder sentence consecutively with his two prior misdemeanor sentences. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE